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IN THE

Supreme Court of the United States

October Term, 1967

No. 791

MORTON SOBELL, *Petitioner,*

against

UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

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On page 3 of the government's brief in opposition there is a purported summary of petitioner's charges in the motion for relief pursuant to Section 2255, Title 28 U.S.C. which is truly remarkable in its glaring omission. No mention is made of the grossest part of the charged fraud, the prosecutors' misstatements, misrepresentations and deceptions, which, along with the false and perjured testimony, made a verdict of guilty inevitable. At no point in its brief does the government even touch upon this aspect of the motion and its failure to do so can be only explained by its inability to defend such conduct.

The false statements and representations, the gross exaggerations, are referred to specifically in the petition for a writ of certiorari and are specifically adverted to in the 2255 motion both in the petition itself and the affidavits in support thereof. It is true that the district court ignored this aspect of the petitioner's motion except for a brief

comment, not at all warranted by the trial record, to the effect that one of the prosecution's statements was allegedly taken out of context. A reading of the trial record fully refutes any such contention.

By ignoring this aspect of the motion the government thereby seeks to avoid dealing with the impact of the prosecution's misconduct upon the jury. The jury, in light of the magnitude of the crime as described by the prosecution, could only return a verdict of guilty since they believed that the very existence of this nation had been placed in peril by these defendants. The sentencing court, also deceived by the prosecution, stated it was compelled to impose the death sentence, the first and only time it had been invoked under the Espionage Act.

Similarly the government's brief in opposition does not discuss or justify the fact that there was deliberate concealment and non-disclosure of facts within the government's possession which would not only have exposed the government's claims as false and exaggerated but would establish that the testimony of their authenticating "expert" witness, Derry, was equally false. By authenticating the Greenglass testimony as to Exhibit 8 and presenting him as a source of accurate and vitally important information it served to make his entire testimony acceptable to the jury and thus required it to reject the testimony of the Rosenbergs, whose testimony, if believed, would have required a verdict of acquittal for the petitioner and his co-defendants.

The petitioner does not here challenge the right of the government to classify as secret the fact that it was engaged in the development of an atomic bomb, the security regulations at Los Alamos, the physical layout of the project, the names of the scientists working there or even the essentially worthless Exhibit 8 and description. Rather it is false claims of accuracy, authenticity and importance given to Government Exhibit 8, that it represented the

stealing of the "one weapon that might well hold the key to the survival of this nation . . . the atomic bomb" (A. 221; R. 183), that it was the theft of the "most important scientific secrets ever known to mankind from this country and delivered them to the Soviet Union" (R. 1519), that the gravity of the alleged crime reached such proportions that the prosecution felt it had the right to characterize the defendants as heinous villains engaged in treasonable activity, who had betrayed their own country, altered the course of world history, and caused the Korean War.

Equally, the issue in the present petition is not that Greenglass was coached but that Exhibit 8 was not at all what the prosecution and its witness Derry represented. Indeed one of the scientists in his affidavit in support of the petition noted that:

> "The errors and omissions cited above are therefore not due simply to haste, and one may perhaps conclude that the sketch does represent its maker's total knowledge of the bomb's construction. If this conclusion is correct this knowledge was very scanty." (A. 318-319)

Hence the issue is not whether Greenglass's drawing of Exhibit 8 was his concept of the Nagasaki bomb.*

The position of the government, as well as that of the lower courts, is that even if the information was inaccurate and incomplete, as detailed by the scientists in their affidavits, that is of no moment in that since the material was classified it still fell within the scope of the indictment and could have led to the conviction of the petitioner and his co-defendants. But that ignores the fact that the trial was irreparably tainted by prosecution misconduct, the

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* At pp. 8-9 of the government's brief in opposition the government erroneously equates the attack upon Greenglass with that upon Derry as it applies to Exhibit 8.

knowing use of false and perjured evidence, the suppression of exculpatory evidence and the failure to correct testimony known to the government to be false. It cannot be said that absent the false and fraudulent evidence and the false statements and misrepresentations of the prosecution the jury would have convicted petitioner or his co-defendants. They well may have accepted the testimony of the Rosenbergs which would have resulted in an acquittal for all.

The jury was instructed by the court to rely upon the help of the "expert" Derry since the subject matter was so technical and Derry not only claimed that he knew what went into the parts of the bomb but that he "understood the entire subject matter".

To argue, as the government does, that the scientists' affidavits do not evidence the fact that Derry's testimony was false or perjured by excerpting a sentence or two here and there is to distort the clear and unequivocal statements contained in the affidavits of the scientists. The affidavit of Dr. Philip Morrison is almost entirely directed towards the testimony of Derry and establishes that either Derry was lying as to his knowledge and expertise or he was perjuring himself in attesting to the accuracy and authenticity of Exhibit 8 and was grossly distorting scientific facts by alleging that the drawing and description contained all the information any scientist would need to construct the atomic bomb.

There were not differences of opinion between Derry and the scientists supporting petitioner's motion. It is not matter of opinion that a plastic sphere is not beryllium, and its purpose was not as described. That is fact. It is not a matter of opinion that the bomb required a complex initiating device containing beryllium and plutonium as an alpha-ray source to commence the detonation of the bomb. Similarly it is a fact that the initiator device was directly related to the nature of the internal core or cavity of the

plutonium and that Exhibit 8 was completely lacking in any information in this respect. One would assume from Exhibit 8 that there was one piece of plutonium when in fact there was not. It is a question of fact not opinion as to whether the bomb was dropped by parachute; and whether boron and aluminum were other parts of the bomb. If Derry knew the facts as did the AEC, with whom the prosecution consulted, the failure to correct the misstatements and the act of stating affirmatively that Exhibit 8 represented essentially the Nagasaki bomb was a plain unmitigated lie. If he did not know the entire subject matter and what went into the bomb he falsely testified in stating that he did, and surely the government knew the facts.

The government in its brief in opposition (p. 4) states that the first 2255 motion as it relates to Exhibit 8 alleges "in substance the same allegations which are made here—that the government represented that the information which it had been transmitting was valuable information containing secrets relating to the production of the atomic bomb". In the context of the facts as set forth in the present application and as adverted to above, this argument of the government is completely refuted by the record.

The testimony of Derry was not challenged on the prior motion. Rather it was relied upon by the petitioner and his co-defendants as a basis of charging the knowing use of perjured testimony by Greenglass in his denial of receiving aid and coaching in the preparation of Exhibit 8. The argument was that since Derry had authenticated Exhibit 8 to be a substantially accurate representation of the atom bomb, and the oral explanation by Greenglass to be an accurate guide for construction of a bomb it would have been impossible for a person such as Greenglass with lack of technical training to draw such a sketch and give such a description without help.

Moreover, Exhibit 8 (still impounded at the time) was never seen by any of the scientists who submitted affidavits on the first motion primarily directed toward the question of Greenglass's capacity to recall, and none of those scientists was involved in the development of the atomic bomb. This point was noted by the government in its opposing affidavits in 1952 and indeed the District Court made a similar observation. *United States* v. *Rosenberg*, 108 F.Supp. 791, 801.

Thus this is *not* a mere shift of emphasis or relitigation of the question of value. This is the exposure of the fraud revealed by the now unimpounded Exhibit 8.

The government further argues that there is nothing in the present motion that could not have been produced at the time of the first motion. If a fraud had been perpetrated in obtaining the conviction of the petitioner and his co-defendants this claimed lack of diligence does not destroy the power of the Writ to undo so grave an injustice, and the judgment of conviction must fall. Further, petitioner has now produced evidence which he could not have produced at the time of the first motion while Exhibit 8 was still impounded. We have affidavits of four eminent scientists intimately involved with the development of the bomb and no such scientists were available to the defense in 1952.

The government mistakes the record when on p. 13 of its brief it indicates that Gold had told of the claimed June 3rd meeting with a G.I. on June 1, 1950 and then argues that this "is particularly significant . . .". As the examination of the tapes will reveal, the person named and the events referred to on June 1st related solely to Alfred Dean Slack. (See p. 61 of the petition for writ of certiorari). The claimed stay at the Hotel Hilton the govern-

ment claims is established by the fact that it showed Gold the films "starting with the Hilton Hotel" and this is said to overcome his statements to his attorneys that he stayed at the Hilton Hotel on only one occasion and that was in September of 1945, *not* June of 1945.

In discussing Exhibit 16 the government argues that the discrepancies of date on the front and back were evident at the time of the trial as well as erasures on the front of the card and that the handwriting on the June card was obviously different from that on the September 19, 1945 card and counsel made no objection although these defects clearly appeared at the time of the admission of Exhibit 16.

Truly, this is a strange argument. Gold never testified at the trial that he stayed at the Hotel Hilton on September 19, 1945 nor indeed was the September card offered or tendered into evidence at the time of the trial nor was the defense aware of his claimed stay at the Hotel Hilton in September of 1945. It is the prosecution which had both of the cards in its possession, in the Southern District of New York, and it knew that there were different handwritings on the two cards although the two bore the same initials "A.K." Second, the erasures are not evident and it required a microscopic examination by a handwriting and document expert to determine that there had been erasures, indeed erasures in the very area of the simulated handwriting of Anna Kinderknecht. Mrs. McCarthy, as evidenced in her report, did not see the exhibit itself until September 9, 1966 (A. 389-395).

It was the Schneirs who had first obtained photostats of the alleged photostats of the two cards in February of 1961. In addition to ignoring the fact that the erasures were located at the area of the overwriting, the government ignores the fact that the questioned documents bore no FBI initials or date of acquisition and that the government acknowledged in the brief below that the manner and time of acquisition as well as the disposition of Exhibit 16

was different than that of the September 19, 1945 card. (See petition for writ of certiorari, p. 48). Nor does the government explain why it disposed of the alleged original of Exhibit 16 in 1951 at the time it was ripe for destruction, and an appeal to the Court of Appeals was then pending.

All of the facts set forth in the papers and as alluded to in the petition for writ of certiorari make a clear *prima facie* showing that Exhibit 16 was in fact a forged document retroactively contrived for the purposes of the trial. This is further supported by the fact that the government acknowledges on p. 15 of its brief that the prosecution did not attempt to introduce Government Exhibit 16 until *after* they were advised by the defense that there would be no cross examination of Gold.

The lower courts and the government in its brief in opposition misread the requirements of a showing pursuant to Section 2255 entitling one to an evidentiary hearing along with the related powers of process attendant thereto. As the government interprets the statute, the moving papers must absolutely "sustain" the charges and "establish" the perjury and falsity charged. Were these standards to be used, that the moving papers had to establish, prove and sustain all of the charges, there never would be an evidentiary hearing in a 2255 proceeding.

The government quotes a portion of the district court's opinion wherein it attacks the allegations concerning Exhibit 16 and the charge of perjury as to the June 3, 1945 meeting as a "theory of a grand conspiracy" and the "product of a fertile imagination". With due respect to the district court, there is substantial direct and circumstantial evidence supportive of the charges made in the motion under Section 2255, and the district court could only arrive at its conclusion by going through an *ex parte* fact-finding process wherein it drew every possible inference adverse to the motion and conjectured and speculated alternative explanations.

The district court's explanation for the disparity in handwriting was merely a speculation on its part as to what might conceivably be established at an evidentiary hearing based upon an assumption without support in the record that such procedure was normally followed at the Hotel Hilton at Albuquerque.

The court was equally in error in drawing an adverse inference against petitioner because no affidavit was obtained from the hotel clerk. The speculations and conjectures, whether made by the government or the court, were matters that were required to be reserved for the evidentiary hearing and at best constituted possible defenses after the petitioner had presented his evidence including that of the testimony of the hotel clerk. Nor did the district court deal with the government's willful refusal to give the circumstances concerning the time, place and personnel involved in the acquisition of Exhibit 16. Moreover it made a finding of fact without any evidentiary support that the alleged original of Exhibit 16 was destroyed in 1957 rather than 1951.

By following such processes and drawing various other unwarranted inferences concerning what might be in pretrial statements to the FBI the district court thereby unfairly denigrated the *prima facie* showing and rendered an opinion of a kind which would only be permissible if an evidentiary hearing had been granted. After having committed these errors and incorrectly characterizing various allegations in the petition and vitiating other allegations, it then arrived at a conclusion that the solid evidence is merely the "product of a fertile imagination".

The fact that serious charges are made concerning the acquisition and presentation of evidence against government agencies or those acting in concert with them is always a matter of grave concern to the courts. The charges by the petitioner cannot be disposed of by being characterized as invective and vituperation on the one

hand and on the other by faulting the petitioner for making them belatedly. The only appropriate way to dispose of these charges in light of the adequate showing made is to put the petitioner to his proof and grant him the limited relief he seeks,—a hearing.

Respectfully submitted,

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